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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 696

EDWARD J. DILLON,
IN THE MATTER OF THE PETITION OF
MANLEY B. STRAYER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the United States District Court for the District of Oregon which directed the United States to pay fees and expenses of counsel appointed by the court to represent a prisoner in connection with proceedings under 28 U. S. C. § 2255.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported at 230 F. Supp. 487 and is appended hereto at pages 13-27 as Appendix 1.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 346 F2d 633 and is appended hereto at pages 28-43 as Appendix 2.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered June 16, 1965.

The order of the Court of Appeals denying the petition for rehearing was entered July 27, 1965.

Jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Does an attorney who has been ordered by a court to represent an indigent have a constitutional right to reasonable compensation for the services he renders pursuant to the order?

STATEMENT OF THE CASE

Edward J. Dillon was charged with armed robbery of a federally insured bank in violation of 18 U. S. C. § 2113(a). He pleaded guilty and was sentenced. A mo-

tion to vacate sentence was filed under 28 U. S. C. § 2255, alleging in substance that his plea was induced by misrepresentations of an Assistant United States Attorney. The United States District Court for the District of Oregon ordered a hearing at which Mr. Dillon requested the court to appoint counsel to assist him. The request was denied. On appeal, the United States Court of Appeals for the Ninth Circuit held that the denial of the request for counsel was error (307 F2d 445).

The Court of Appeals stated that, although the mandatory requirement of the Sixth Amendment regarding the right to counsel does not apply to indigents moving under 28 U. S. C. § 2255, the appointment of counsel in such proceedings may be required to satisfy the due process clause of the Fifth Amendment. The Court of Appeals then held that, in the circumstances of the case, the appointment of counsel was required and remanded the cause to the District Court for further proceedings.

On remand, the District Court considered the command that it order a member of the bar of that court to represent Mr. Dillon throughout a rehearing of his 28 U. S. C. § 2255 civil proceedings, and thereupon appointed petitioner, Manley B. Strayer, and directed petitioner to represent Mr. Dillon in the proceedings.

Thereafter, the cause was reheard de novo by the

District Court with petitioner acting throughout as attorney for Mr. Dillon, resulting in an order setting aside the original sentence of Mr. Dillon.

Thereafter, petitioner, upon the suggestion and invitation of the District Court, petitioned for reasonable compensation for his services performed and expenses incurred as court-appointed counsel for the indigent Mr. Dillon.

The District Court thereupon ordered that the Attorney General of the United States appear to show cause why judgment should not be entered against the United States and in favor of petitioner for such amount as might be determined reasonable compensation and fees for petitioner's services and expenses performed and incurred as court-appointed counsel.

After hearing, the District Court held that its order requiring petitioner to represent Mr. Dillon was a taking of petitioner's property for a public use, within the meaning of the Fifth Amendment, and that just compensation was therefore payable. The District Court entered judgment for petitioner and against the United States in the sum of $3,804.54, payable by the General Accounting Office, pursuant to 28 U. S. C. § 2414.

On appeal, the Court of Appeals for the Ninth Circuit held that there was no "taking," in the constitu-

tional sense, of petitioner's services and reversed the judgment of the District Court.

The Court of Appeals rested its decision on the obligation a lawyer has imposed upon him "by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice." The court considered that a lawyer consents to and assumes the obligation to serve without compensation upon court order.

The Court of Appeals expressly did not consider whether the services rendered by petitioner constitute "property" within the meaning of that term as used in the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with this Court's opinions in

Schware v. Board of Bar Examiners
(1957) 353 US 232 and

Konigsberg v. State Bar of California
(1957) 353 US 252

where it was held that the practice of law is not a mere privilege, but a right protected by the Fourteenth Amendment.

Cases denying the right to compensation for court-

ordered representation of indigents have rested their decisions on the premise that the practice of law is a mere privilege which must bear such burdens as the state chooses to impose upon it. See, for example,

Ruckenbrod v. Mullins (1943) 102 Utah 548, 133 P2d 325, 331

> "If the right to engage in the practice of law were one of those rights protected by the 14th Amendment, it might be unconstitutional to require those who engage in the practice of law to submit to the burdens now placed on the legal profession. But the cases hold that the right to practice law in the state courts is not a privilege or an immunity of a citizen of the United States which is protected by the 14th Amendment. In Ex parte Lockwood, 154 U.S. 116, 14 S.Ct. 1082, 1083, 38 L.Ed. 929, the court refused to review the order of the Virginia Sup. Court which denied the application of a woman for admittance to the bar of Virginia."

The foundation upon which the denial of an attorney's right to compensation was built has thus been torn away.

And an attorney's services (the only wares he has to sell) are compensable property under the Fifth Amendment and may not be taken from him for a public use without the payment of just compensation. See

United States v. General Motors (1944) 323 US 373, 378

> "* * * the constitutional provision [fifth amendment] is addressed to every sort of interest the citizen may possess."

and

United States v. Howe (WD Ark, 1881) 26 Fed Cas No. 15, 404a

> "* * * the skill and professional experience of a man are so far his individual capital and property, that he cannot be compelled to bestow them gratuitously upon any party; that neither the public, any more than a private person, have a right to extort services from him in the line of his profession or trade, without adequate compensation."

The Court of Appeals' decision does not adequately explain how on the one hand the courts can impose upon attorneys the obligation to serve without compensation as a condition to their right to practice law, if on the other hand each attorney has the constitutional right and privilege to practice law. Moreover, the court's decision ignores the obligation of the public to pay just compensation for that which it takes for its own purposes.

2. The decision of the Court of Appeals is out of harmony with the needs of the public.

The decision of the District Court allowing com-

pensation to petitioner recognizes the obligation of the public to supply counsel to represent indigents and fulfills the need that such counsel be provided the financial means to assist the indigent in preparing and presenting a defense which will satisfy the constitutional rights of the accused. The public's interest in criminal defense is not to prosecute unfairly but to provide the requisites for due process. The Court of Appeals' decision does not permit the satisfaction of those requisites.

3. The decision of this Court in

Gideon v. Wainwright (1963)
372 US 335

has increased the necessity of providing counsel to indigents manyfold.

To date, this obligation is the primary financial responsibility of a minority of the members of the bar of the several states who are ordered by courts to represent indigents. Some states provide no compensation —not even reimbursement for out of pocket expenses. Many states limit the compensation of court-appointed counsel to amounts which do not compensate the counsel for his time except possibly in those instances where the accused pleads guilty.

The Criminal Justice Act of 1964 (78 Stat. 552, 18 U. S. C. § 3006 A) belatedly provided for limited com-

pensation of attorneys appointed to defend the indigent in criminal proceedings.

However, the proceedings in which Mr. Dillon was represented by petitioner were civil proceedings pursuant to 28 U. S. C. § 2255. A large percentage of the proceedings in which indigents attempt to apply decisions such as *Gideon* and in which counsel are appointed to represent them are post-conviction proceedings, which are civil in nature, and are not covered by the Criminal Justice Act. The Circuit Court of Appeals failed to give due significance to this large area of representation not covered by the Act and also failed to take into account the fact that the "traditional obligation" to represent indigents grew up largely with regard to criminal proceedings and not with regard to civil proceedings.

Respondent argued and the Court of Appeals held that there is no constitutional obligation to pay court-appointed counsel because the bar has an ancient and established tradition of providing counsel for little or no compensation. We believe the tradition is an honorable one, but that it has no relevance to right to compensation. It is true that members of the bar feel it to be an ethical duty not to withhold counsel and advice to those who are unable to pay, but the ethical obligation to serve is a voluntary one, quite separate and distinct from the inherent power of the court to compel the

service. The Court of Appeals decision appropriates a private obligation to contribute to a government protected right. We believe there is no such right of a branch of the government to invade the private obligation and refuse compensation on the ground of tradition. We are here concerned with a branch of government requiring public service and refusing just or any compensation. The question is whether the public or a small group of a particular class of citizens must bear the financial burden of the representation of indigents. Certainly, lawyers are the only class of citizens able to provide the required counsel, but the constitutional obligation to furnish it is the public's and just compensation is required when property is taken for a public purpose.

Additionally, the aforementioned tradition of the bar can hardly be said to extend to the ultimate consequences of *Gideon*.

4. Great legal interest in the issues here presented has been engendered by the decisions of the District Court and by the Court of Appeals as evidenced by the near score of law review notes and comments.

The issues here presented are also before the New York Court of Appeals in the case *People of the State of New York v. Dowdle;* and the Superior Court of New Jersey, Appellate Division, in the case of *New Jersey v.*

Couch (Docket No. A-723-64); and the Supreme Court of the State of California, in the case of *Lascher v. The State of California* (No. L. A. 28544).

Moreover, other lawyers have filed in other courts motions for compensation similar to that filed by petitioner herein and courts have withheld decision pending final disposition of this case.

The monetary sum involved here is small but the legal questions presented are of great importance and need to be resolved finally by this Court for the benefit of the public, the bar and indigent defendants.

CONCLUSION

The decision of the Court of Appeals is in conflict with the dictate of the Fifth Amendment requiring that just compensation be paid for property taken for public purposes. The decision does not satisfy the need of the public or the indigent accused that due process of law be put within the practical and not merely the theoretical reach of all. It does not satisfy the rights of the court-appointed attorney that he be provided the economic ability to do what his ethical obligation demands and to be compensated when his property is taken for a public purpose.

Due process demands that counsel be appointed to represent indigent criminal defendants and in certain

instances indigent prisoners. The satisfaction of this requirement of due process will remain hollow until steps are taken to insure that appointed counsel be given the means, so far as the law can provide them, of assuring the indigent that his defense will not go wanting for a lack of funds.

For the foregoing reasons petitioner respectfully prays that his petition for writ of certiorari be granted.

Respectfully submitted,

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Appendix, Part I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EDWARD J. DILLON,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

Civil No. 61-349
MEMORANDUM OF DECISION
June 22, 1964

EAST, District Judge.

In these Title 28 U.S.C.A. § 2255 proceedings, Edward J. Dillon (Dillon) sought to set aside his judgment of conviction and sentence of 18 years' imprisonment for armed bank robbery on a premise in the main that the United States Attorney had secured his plea of guilty to the crime upon a promise of a sentence of imprisonment not to exceed 10 years. The Court had at a prior time heard the same contention in a Rule 35 F.R.Crim.P. proceedings whereat Dillon was represented by counsel, resulting in a denial of relief. The Court again heard the contentions in these proceedings when Dillon (although at midhearing he had requested counsel), was not represented by counsel, and was again denied relief.

The Court of Appeals for the Ninth Circuit, 307 F2d 445 (Aug. 22, 1962), reversed this Court's denial

of relief in these proceedings, holding ". . . that it was clear error to refuse (Dillon, an indigent prisoner) request for a lawyer . . ." to prosecute the proceedings, and remanded the cause for consistent proceedings.

Thereafter, this Court, in proceedings held in open court, declared that the remand was ". . . tantamount to a direct command to me to order a member of the bar of this court to represent Dillon throughout a rehearing of his § 2255 civil proceedings . . ."; and thereupon appointed Mr. Manley B. Strayer, an attorney of the highest standing and stature and extended experience at the bar of this court, and directed him to represent Dillon in Dillon's claims and contentions of a denial of his Constitutional rights, allegedly culminating in his unlawful conviction and sentence. Thereafter, the cause was reheard de nova, with Mr. Strayer acting throughout as attorney for Dillon (attorney), resulting in an order setting aside the original sentence but not the plea of guilty and conviction of Dillon, and a resentencing to a like term of imprisonment of 18 years, with full credit for time and allowances gained and accrued under the original sentence, and eligibility for parole.[1]

Thereafter, the attorney, upon the suggestion and

1. Dillon appealed again, and following a second remand by the Court of Appeals, Dillon has been resentenced a third time. However, this stage of a second appeal and remand thereunder is not now within our present sphere of inquiry and action.

invitation of this Court, petitioned for reasonable compensation for his services performed and expenses incurred as court-appointed counsel for the indigent Dillon, whereupon the Court ordered:

> ". . . that the Attorney General of the United States appear, by and through The Honorable Sidney I. Lezak, Acting United States Attorney for the District of Oregon, on or before 45 days from the date hereof, to show cause, if any there be, why judgment should not be entered against the United States and in favor of Manley B. Strayer for such amount as may be determined by the Court to be reasonable compensation and fees for his services and expenses performed and incurred as court-appointed counsel herein, . . ."

At the hearing, the attorney was granted leave to file herein his supplemental application and claim for just compensation in the amount of $5,000.00 for services and the amount of $24.50 expenses incurred.

The Court, having received the testimony and evidence offered in support of the claim and considered the statements and advice of counsel, and now being advised in the premises, enters this memorandum of decision.

At the outset it must be made crystal clear that this Court is in nowise ignoring, outmoding or otherwise disparaging or relaxing the professional ethical obligation of attorneys admitted to the bar of this state and district

to at all times freely give of their professional efforts, services, and time, without regard to cause or compensation, upon appropriate request of persons and the Court. The attorney and his able counsel in this phase of the proceedings, Mr. Clifford N. Carlsen, Jr., are acting in accordance with the highest traditions and ethics of the profession to give aid to this Court in dealing, as we are, with only the Constitutional rights of attorneys to be justly compensated in return for their professional expertise, service, time, and personal expense upon the direct order of the Court, in compliance with its duty to furnish and provide an indigent person due process in connection with criminal charges and conviction.

This is no time to quarrel over niceties of distinction as to whether these proceedings are civil or criminal in nature.[2] The simple fact is that Dillon was here seeking relief through Congressional streamlined proceedings from a judgment of conviction and sentence of imprisonment under the claim that the judgment was had and obtained through a denial of due process in the criminal

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2. "'. . . an application under § 2255 is a new and independent civil proceeding for which the clerk of a district court must collect a docket fee or permission to proceed in forma pauperis must be granted.' (See Clerks Manual, Transmittal Sheet No. 10, May 5, 1960, issued by the Administrative Office of the United States Courts, requiring the clerks to charge a $15 filing fee on the filing of motions attacking sentences under § 2255).

'. . . . classification of the proceedings [(a) as a new and independent civil action, like a petition for habeas corpus, from (b) a step in the criminal proceedings, like a writ of error coram nobis] must be made for the guidance of litigants and court clerks,' Martin v. United States, 10 Cir., 1960, 273 F.2d 775, 777-778." Criticized in *Brown v. United States*, 186 F.Supp. 410, 411 n. 2 (D.Or. 1960).

The Court of Appeals (in *Dillon*) says, "Realistically a proceeding which may result in vacating a criminal judgment is, at least, not purely civil."

proceedings and that he is an indigent person without funds to employ counsel of his own choosing.

While it may not have been so two short years ago, no one can now question the inescapable logical result that, if an indigent person charged with serious crime is entitled as a matter of Constitutional right to counsel throughout trial prior to judgment of conviction, he must be likewise entitled to counsel as a matter of Constitutional right in obtaining judicial relief from an unconstitutional judgment of conviction by reason of a denial of due process occurring at the time he was entitled to trial counsel.

The attorney purely and simply asserts that his services, office, and out-of-pocket expense have been commandeered and taken by the government for a public use and claims just compensation therefor under the Fifth Amendment to the Constitution. The Attorney General advises that the Court has no authority to fix compensation and order the United States to pay such to the attorney for his legal services, and I would agree, only to the extent that, as far as we are all now advised, there is no present federal judicial pronouncement that this Court does have such authority. The Attorney General further advises the Court that only Congress can authorize and direct the expenditure of public money for the payment of compensation to the members of the bar called upon to represent indigent criminal defend-

ants, and advises that Congress is now engaged in the process of providing for such authority and direction to the federal judiciary.[3] I do not understand that the United States district courts have no authority to order the United States to comply with the Fifth Amendment to the United States Constitution and pay just compensation for property taken for a public use merely because Congress has failed to provide Congressional direction and implementation for such payment; quite the contrary, I understand that *it is* for the United States district courts to decide, when presented with a claim for such, whether:

(a) There has been in fact a "taking" and whether

(b) The use of such taking is in fact a public use, regardless of whether the taking was pursuant to a declaration and implementation therefor by Congress. In support of this understanding as to the "taking," I refer to *United States v. Finn*, 127 F.Supp. 158, at p. 167 (S.D. Cal. 1954); and *Armstrong v. United States*, 364 U.S. 40, pp. 48-49 (1960). *Finn* cites *Campbell v. United States*, 266 U.S. 368, pp. 370-371 (1924), which I pinpoint only to place before us the jurisprudential thrust of that decision and of the decisions analyzed in support thereof. The thrust is simply this—where an officer of

3. And so it is and has been for the past quarter century, with no Congressional action. Furthermore, I am advised that the present Congressional proposals for government-paid compensation to counsel for indigent criminal defendants do not include provision for court-appointed counsel in the after-conviction or collateral proceeding such as these § 2255 proceedings.

the army, acting under orders of the Secretary of War and without obtaining the owner's consent or instituting condemnation proceedings or making any compensation therefor, took possession of the owner's land, there arose an implied promise by the United States to compensate the owner of this loss, whereupon the owner became entitled to have the just compensation, as safeguarded by the Fifth Amendment. The decision analyzed is *United States v. Lynch*, 188 U.S. 445, 464, 465 (1903), which advises us:

> "The rule deducible from *these cases* is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. . . . The government may take personal or real property whenever its necessities or the exigencies of the occasion demand . . ., but the Constitution in the Fifth Amendment guarantees . . . that when this . . . right of appropriation . . . is exercised it shall be attended by compensation."

Two of "these cases" referred to in *Lynch—United States v. Palmer*, 128 U.S. 262 (affirming Ct.Cl. 1888); and *United States v. Berdan Fire-Arms Co.*, 156 U.S. 552 (affirming Ct.Cl. 1895), are of specific interest to us. In each of these two cases, a patentee claimant recovered "reasonable compensation" under the implied-contract theory for the use of his invented improvement to infantry equipment which had been adopted

by the Secretary of War without Congressional declaration of need or use, or other implementation or prior condemnation proceedings. This was, pure and simple, a judicial declaration, as distinguished from a Congressional declaration, of a taking for a public use in fact. We would do well to acknowledge the truism that a design or concept of a mechanical improvement to firearms and its work product or function, acquired by the appropriation and use of that design or concept, is the end result of the appropriation and use of the time, effort, and expertise of the inventor.

In Armstrong, *supra*, The United States, through default remedies of a boat-building contract, acquired the title to certain naval boats, and, by reason of the government's immunity to suit, materialmen's liens which had attached to the boats, under state law for the benefit of laborers and materialmen, were nullified and defeated. The Court (reversing the Court of Claims) allowed just compensation for the value of the liens so defeated for the reason that there had been, in fact, a taking of these liens from materialmen for which just compensation was due them under the Fifth Amendment (p. 48). While it appears that the lien claimants in *Armstrong* were materialmen, it could hardly be suggested with reasonable logic that the result would have been otherwise had the liens been for the work product of laborers, rather than for materials supplied.

In support of the premise as to the office of a judicial declaration of a public use in fact, I quote Judge Mathes in Finn, *supra*, p. 167:

> "It is for the courts to decide whether the use is in fact a public use, Shoemaker v. United States (1893), 147 U.S. 282 . . . and the Supreme Court has just observed that 'the concept of the public welfare is broad and inclusive.' Berman v. Parker, 248 U.S. 26."

Whether the attorney's claim is to be predicated upon the gray-area premise of an implied contract, or the black-and-white premise of a judicial implementation of the self-executing exigencies of the Fifth Amendment itself, this district court has jurisdiction to deal with the claim. Title 28 U.S.C.A. § 1346 provides, *inter alia*:

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: (2) Any . . . claim against the United States not exceeding $10,000.00 in amount, founded either upon the Constitution, . . . or upon any express or implied contract with the United States, . . ."

Section 2402 of Title 28 provides, *inter alia*:

> "Any action against the United States under § 1346 shall be tried by the court without a jury . . ."

excepting action under 1346 (a)(1).

As was the chore of the Court in *Armstrong*, our query now turns as to whether:

(1) The attorney's license to practice law before the bar of this Court, his time and expertise, his law-office help, facilities, and supplies, and his own out-of-pocket expense, are "compensable property interests within the meaning of the Fifth Amendment"; and whether

(2) This Court's order appointing and directing the attorney to serve under his license and give of his legal learning, enterprise, and astuteness and office facilities, with personal monetary expense in the legal representation of Dillon in these proceedings, constitute

(a) A "taking" of such compensable property for

(b) A public use.

As to query (1) above, our answer comes quickly. If the work product of an inventor or a laborer claiming a lien be compensable property, so is the work product of a lawyer, and his office expenses and out-of-pocket money are such, per se.

As to query (2), we know from our eighth-grade civics that the power of eminent domain is an inherent essential attribute of sovereignty and is one of the prerogatives of the sovereign to aid it in the perform-

ance of its Constitutional or organic activities under the premise and purpose that no one person or group or classification of persons should bear economic losses in the operation of government, but, on the contrary, such losses and expenses should be borne by all the people equally and equitably. Armstrong, *supra*, p. 49, is a judicial (as distinguished from a Congressional) implementation of the "Fifth Amendment guarantee that private property shall not be taken for a public use without just compensation." *Armstrong* is a classical expression of the simple fact and truth that the Fifth Amendment guarantee of the payment of just compensation "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

It used to be thought by some that the attaining in the first instance and the continuation of the status as a member of the bar of a given court and a license thereunder, was a privilege at the discretion of that court, but no longer does that special-class myth obtain. It needs only to be stated that today, if one holds the prescribed qualifications, he must be admitted to practice before that court as a matter of right, and the attorney, having once acquired that license, can only be deprived of it through the judicial exercise of due process. *Schware v.*

Board of Bar Examiners, 353 U.S. 232 (1957); and *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

For a court to order a member of its bar to give of his services under his license and of his office facilities and money is no less an appropriation of services and property (by reason of the attorney's deference to the court), and is an usurpation, utilization, and necessarily a "taking" of those compensable property interests of the attorney as surely as is the wiping out of the materialmen's liens or the utilization of the inventor's product. Each hour and day of the commandeered and appropriated services of the attorney was a total and complete taking of the present value thereof, as well as a destruction of the value of that hour or day to the other demands and enterprises of the attorney. Time of the lawyer, utilizing his expertise and backed with his law-office tangible help and facilities, is his only salable asset.

A long time ago, it was declared:

> "The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights." *Webb v. Baird*, 6 Ind. 13 (1854).

Moreover, since the Constitutional right to legal counsel now requires for the indigent legal "representation in the role of an advocate" through trial, appeal, and attack of judgment of conviction [*Douglas v. California*, 372 U.S. 353, 357], no longer should the "some people" in the legal profession alone bear the burden of the cost and expense of the now-recognized organic obligation of the sovereign in connection with the administration of criminal law to furnish and supply legal representation for the indigent. This public burden ". . . in all fairness and justice, should be borne by the public as a whole."

The administration of criminal justice is an organic or Constitutional obligation of the sovereign United States, and all incidents thereto necessarily are facets of the public use and benefit. In fact, the prosecution of the guilty and the protection of the innocent is the keystone of American criminal justice. The protection of the public on one hand, and the interests of the convicted as an individual on the other, through all stages and phases of obtaining and keeping of only a lawful judgment of conviction and sentence, are the cross-currents of the mainstream of a peaceful and tranquil society within our government—it is a public use and purpose of the sovereign—from inception of criminal charge to the end of sentence. The production of witnesses for an indigent defendant is a phase of due process—the supply-

ing of a transcript of proceedings to an indigent defendant through the services, expertise and facilities of the court reporter is a phase of due process, as is the supplying of a mental or physical examination through the services and expertise of a physician, and so must also be a supplying of the license, time, expertise, office facilities and expense of an attorney for the indigent. The supplying of every need at every phase in obtaining and preserving lawful judgment of conviction and sentence and the disgoring of unlawful judgment of conviction and sentence through due process of law is a public use and purpose.

It necessarily follows that legal representation is a necessary facet of the government's public obligation of furnishing due process for Dillon in these proceedings, and the supplying of the same by the attorney was for a public use.

I conclude here, as did the Court in Armstrong, *supra*, that a ". . . fair interpretation of (the Fifth Amendment) protection entitles (Mr. Strayer) to just compensation here."

I find from the evidence that Mr. Strayer gave and performed a total of 108 hours of his professional licensed time, backed by his law-office help and facilities, and spent $24.54 of his own money in the performance of his appointment and direction by the Court to act as

counsel for Dillon in these proceedings. Further, that in view of the fact that the substance and weight of the traffic of this cause falls within the realm of humanities rather than commerce, the sum of $35.00 per hour is reasonable and just compensation for the licensed services, backed by his law office, of Mr. Strayer, which, in commerce, would justify a much greater amount, and I conclude that Mr. Strayer is entitled to judgment, without costs, against the government for the aggregate sum of $3,804.54 as just compensation, payable by the General Accounting Office, pursuant to Title 28 U.S.C.A. § 2414.

This memorandum of decision is adopted as this Court's findings of fact and conclusions of law herein, as provided by Rule 52(a) F.R.Civ.P., and the Clerk of this Court shall forthwith, upon the entry of this memorandum of decision, prepare, sign and enter judgment as herein indicated, without awaiting any further direction of this Court, pursuant to Rule 58, F.R.Civ.P.

DATED at Prescott, Arizona, this 22nd day of June, 1964.

Appendix, Part II

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Appellant,

vs.

EDWARD J. DILLON,
IN THE MATTER OF THE PETITION
OF MANLEY B. STRAYER,
Appellee.

No. 19,629

[June 16, 1965]

On Appeal from the United States District Court for the District of Oregon

Before: HAMLEY and JERTBERG, Circuit Judges, and MATHES, District Judge.

JERTBERG, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the District of Oregon, directing the United States to pay fees and expenses of counsel appointed by the court to represent a prisoner in connection with proceedings under 28 U.S.C. § 2255. The opinion of the district court, *Dillon v. United States*, is reported at 230 F.Supp. 487.

The jurisdiction of the district court to enter such a

judgment against the United States was asserted under the Tucker Act, 28 U.S.C. § 1346. The jurisdiction of this Court over the present appeal rests on 28 U.S.C. § 1291.

The facts are not in dispute. The following summary is taken from appellant's brief, to which appellee takes no issue.

In a proceeding under 28 U.S.C. § 2255, Edward J. Dillon sought to set aside a sentence of 18 years for armed bank robbery. This sentence had been imposed after Dillon had pleaded guilty. Dillon alleged that the plea was induced by a false promise of a lenient sentence. The district court held a hearing on the petition under 28 U.S.C. § 2255 and denied the relief requested. During the course of this hearing, Dillon made a request for counsel, which was denied. See *Dillon v. United States, supra.*

This Court, with one member dissenting, reversed the district court's denial of relief, on the ground that counsel should have been appointed. *Dillon v. United States,* 307 F.2d 445. The case was remanded for a hearing.

Upon remand, the district court noted that this Court had premised its holding on the ground that the case presented a "subtle and difficult issue of fact." 307 F.2d at 451. The district court stated that "in view of the Court of Appeals appraisal of the matter, I feel that I

must designate an attorney with some considerable experience and with some means."

The district court appointed Manley Strayer, Esquire, of the firm of Hart, Rockwood, Davies, Biggs & Strayer, of Portand, Oregon. At the time of the appointment, the district court stated that—

> I think that in executing the command of the Court of Appeals I am conscripting your services for the benefit of another person to whom, I suggest, the government owes the duty to supply, and taking your property without just compensation.

Accordingly, the court invited Mr. Strayer to make application for compensation upon completion of his services.

At the hearing on Dillon's petition under 28 U.S.C. § 2255, the district court held that Dillon's plea of guilty had not been coerced or induced by a false promise. However, the sentence was vacated on the ground of a violation of Rule 32(a) of the Federal Rules of Criminal Procedure, Dillon being held for resentencing. *Dillon v. United States*, 218 F.Supp. 948 (D.Ore.)

Mr. Strayer then applied for compensation, pursuant to the district court's invitation. Mr. Strayer requested a fee of $5,000, plus expenses of $24.50.

The district court held that it had jurisdiction under the Tucker Act to grant the relief requested, either on the basis of an implied contract or the Fifth Amend-

ment. The Tucker Act gives district courts jurisdiction concurrent with the Court of Claims of claims not exceeding $10,000 "founded either upon the Constitution * * * or upon any express or implied contract with the United States * * *" 28 U.S.C. § 1346(a)(2).

The district court further held that its order requiring Mr. Strayer to represent Dillon was a taking of Mr. Strayer's property for a public use, within the meaning of the Fifth Amendment, and that just compensation was therefore payable. The court ordered payment of compensation in the amount of $3804.54 representing $35 per hour for 108 hours, plus $24.54 expenses. The court noted that "the licensed services, backed by his law office, of Mr. Strayer, * * * in commerce, would justify a much greater amount * * *." But the court fixed the figure of $35 an hour "in view of the fact that the substance and weight of the traffic of this cause falls within the realm of humanities rather than commerce * * *."

While appellant argues in its brief that representation of indigents in criminal cases in the courts of the United States, by court appointed counsel, does not constitute involuntary servitude in violation of the Thirteenth Amendment to the Constitution of the United States, and that court appointed counsel in such cases have no contractual claim against the United States for

compensation, the position of appellee, both on brief and oral argument, is clear that he relies entirely upon the quoted provision of the Fifth Amendment to the Constitution of the United States. In his brief he states:

> "Appellee makes no claims relative to involuntary servitude. We agree that a court may issue a valid order compelling a lawyer to represent an indigent. The enforcement of civil rights by compelling the incidental giving of personal services cannot be considered an imposition of involuntary servitude."

Also in his brief it is stated:

> "Appellant argues that appellee has no contractual claim to compensation under the Tucker Act [28 USC 1346 (a)]. The Tucker Act gives federal district courts original jurisdiction, concurrent with the Court of Claims, of civil actions founded upon either the Constitution or upon any express or implied contract with the United States. We make no contractual claim."

Appellee's counsel, in oral argument, confirmed the position of appellee as stated in his brief. In these circumstances it appears to us that the question which we are called upon to decide may be properly stated as follows:

> "DOES AN ATTORNEY WHO HAS BEEN APPOINTED BY A JUDGE OF A UNITED STATES DISTRICT COURT TO REPRESENT AN INDIGENT IN A CRIMINAL CASE[1] IN THE COURTS OF THE

1. We recognize that the mandatory requirement of the Sixth Amendment regarding lack of counsel does not apply to indigent movants under 28 U.S.C. § 2255. In *Dillon v. United States*, 307 F.2d 445, we held that compliance with the Due Process Clause of the Fifth Amendment required the appointment of counsel in this § 2255 proceedings.

UNITED STATES, HAVE A RIGHT, UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, TO BE COMPENSATED FOR THE SERVICES HE RENDERS PURSUANT TO THE ORDER OF APPOINTMENT?"

In seeking to establish that appellee has no right under the Fifth Amendment to compensation for the services rendered, appellant relies upon two grounds: First, that there is no "taking" under the Fifth Amendment when a lawyer is required to fulfill an obligation which he has accepted; and, Second, that the term "property" as used in the Just Compensation Clause of the Fifth Amendment does not include personal services.

Appellant's brief contains a very complete and scholarly treatise which in our view establishes an obligation on the part of the legal profession to represent indigents upon court order, without compensation. We include portions of such brief in an appendix to this opinion. As the appendix points out, the obligation of the legal profession to serve indigents on court order is an ancient and established tradition, and that appointed counsel have generally been compensated, if at all, only by statutory fees which would be inadequate under just compensation principles, and which are usually payable only in limited types of cases. Further, as shown in the Appendix, the vast majority of the courts which have passed on the question have denied claims of appointed

counsel for non-statutory just compensation, pointing out that representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services." Cf. *Kunhardt & Company, Inc. v. United States*, 266 U.S. 45 (1925).

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court held, in a capital case where the defendant was unable to employ counsel and was incapable of making his own defense adequately because of ignorance, etc., that it was the duty of the court to assign counsel for him, and stated at page 73:

> "Attorneys are officers of the court, and are bound to render service when required by such an appointment."

Appellee premises his claim to just compensation,

in part, on the holdings of the Supreme Court in *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) and *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), that a state cannot exclude a person from the practice of law in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Such decisions do not support appellee's claim that there has been a taking of his services without just compensation when he performs an obligation imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice.

The problem of providing some system of compensation for appointed counsel, in light of the developing law of the right of indigents to counsel, is a matter for legislative and not judicial treatment. This fact has been recognized by the Congress in the enactment of the Criminal Justice Act of 1964, 78 Stat. 552. The provisions of the Act clearly show that the compensation provided for in said Act is not based upon the principles of just compensation which appear in the Fifth Amendment.

Since we have arrived at the conclusion that there was no "taking", in the constitutional sense, of appellee's services, it is unnecessary for us to consider whether the services rendered by appellee constitute "property" with-

in the meaning of that term as used in the Fifth Amendment.

The order of the District Court is reversed.

APPENDIX

I. *Appointment of counsel to represent an indigent is not a taking of property under the Fifth Amendment*

A. Representation of indigents is a traditional professional obligation of the bar, which a lawyer undertakes when he becomes a member of the bar. There is thus no "taking" when a lawyer is required to fulfill that obligation

Representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America. And yet counsel appointed to represent indigents have rarely received anything more than statutory fees which generally do not pay a lawyer what he could get elsewhere for his services. Thus, when a court requires a lawyer to represent an indigent without any compensation, or for less compensation that he could get elsewhere, the court is merely requiring the lawyer to discharge an obligation which is part of the professional tradition he assumed upon becoming a lawyer. There is no "taking."

The tradition of representation of indigents in England has existed for nearly half a millenium. In Holdsworth's *A History of English Law*, vol. 2, p. 491 (3d ed., 1923), it is stated that serjeants-at-law "from a very early period * * * might be required by any of these courts

[courts in which they could practice] to plead for a poor man." Holdsworth then cites examples from the Year-books of the fifteenth century.[2]

The commitment of the lawyer to serve upon court assignment was put in unequivocal terms in the seventeenth century by Chief Justice Hale, who stated that "if the Court should assign [a serjeant] to be counsel, he ought to attend; and if he refuse * * * we would not hear him, nay, we would make bold to commit him." ..... *v. Scroggs,* 1 Freeman 389, 89 Eng. Rep. 289 (King's Bench, 1674). See *Trevianon v. Anon.*, 12 Mod. 389, 88 Eng. Rep. 1535 (King's Bench, 1702) (plaintiff moves for appointment of counsel "for none would voluntarily appear for him"; court appoints counsel). See also Beaney, *Right to Counsel in American Courts* 10 (1955) citing an example of appointment of counsel for a robber in 1755.

In England, the obligation of the lawyer to serve upon court assignment apparently developed as a matter of common law. It was not until 1695 that there was a limited statutory recognition of this obligation: a statute was passed requiring the courts to appoint counsel upon the request of a person accused of treason. 7 and 8 W.3, c.3, s.1 (1695).

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2. Holdsworth also cites a request made by plaintiffs in 1292 that the court "grant them a serjeant" "for that they are poor folk." Holdsworth, *op. cit. supra,* at 491 n. 3.

However, in colonial America, there was, in addition to the common law, a more extensive statutory recognition of the obligation of counsel to represent indigents upon court order. This was in the form of several statutes requiring assignment of counsel upon request of accused persons unable to retain counsel—statutes presupposing the existence of an obligation on the part of counsel to serve when assigned. Thus a Pennsylvania statute of 1718 provides for assignment of counsel in the case of a large number of capital crimes. 3 Statutes at Large of Pennsylvania 1712-1724, pp. 199, 201 (Busch, 1896). See *Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. St. 41, 45 n. 1, 24 A. 2d 1, 3 n. 1 (1942). A Delaware statute of 1709 and a South Carolina statute of 1731 provided for assignment of counsel in the case of any capital offense—a category which included many more offenses than it does today. See Beaney, *Right to Counsel in American Courts* 16-17 (1955).

After the Revolutionary War, there was additional statutory, as well as common law, recognition that counsel might be ordered to represent indigent accused persons. A New Jersey statute of 1795 required the courts in all cases of indictment to asign counsel to persons not able to procure counsel. See Beaney, *op. cit. supra* at 18-22. Finally, federal statutory recognition of the obligation of counsel to serve when assigned came as early as 1790, when Congress passed an act requiring assign-

ment of counsel at the request of any person accused of treason or other capital crime. 1 Stat. 118 (1790).

Thus the obligation of counsel to serve indigents is an ancient and established tradition of the legal profession. Any yet appointed counsel have generally been compensated, if at all, only by statutory fees which would be inadequate under just compensation principles and which are usually payable only in limited types of cases.

In view of the foregoing it is not surprising that the vast majority of courts, which have been passed on the question, have denied claims of appointed counsel for nonstatutory just compensation, pointing out that representation of indigents under court order without a fee is a traditional obligation of the bar and therefore a condition under which lawyers are licensed to practice as officers of the court. *Posey & Tompkins v. Mobile County*, 50 Ala. 6 (1873); *Arkansas County v. Freeman & Johnson*, 31 Ark. 266 (1876); *Lamont v. Solano County*, 49 Cal. 158 (1874); *Rowe v. Yuba County*, 17 Cal. 61 (1860) (Field, J.); *Elam v. Johnson*, 48 Ga. 348 (1873); *Vise v. The County of Hamilton*, 19 Ill. 78 (1857); *Johnson v. Whiteside County*, 110 Ill. 22 (1884); *Johnston v. Lewis and Clarke County*, 2 Mont. 159 (1874); *People ex rel. Whedon v. Board of Supervisors*, 192 App. Div. 705, 183 N.Y.S. 438 (3d Dep't, 1920); *Washoe Co. v. Humboldt*

Co., 14 Nev. 123, 128 (1879); *Wayne County v. Waller*, 90 Pa. St. 99 (1879); *Ruckenbrod v. Millins*, 102 Utah 548, 133 P.2d 325 (1943); *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876 (1892); *Nabb v. United States*, 1 Ct. Cl. 173 (1863). See *House v. Whitis*, 64 Tenn. (5 Baxt.) 690, 692 (1875). Claims of appointed counsel for nonstatutory just compensation have also been denied on a variety of other grounds. *Case v. Shawnee County*, 4 Kan. 511 (1868); *State v. Simmons*, 43 La. Ann. 991, 10 So. 382 (1891); *Bacon v. The County of Wayne*, 1 Mich. 461 (1850); *Dismukes v. Board of Supervisors*, 58 Miss. 612 (1881); *Kelley v. Andrew County*, 43 Mo. 338 (1869); *People ex rel. Ransom v. Board of Supervisors*, 78 N.Y. 622 (1879); *Pardee v. Salt Lake County*, 39 Utah 482, 118 Pac. 122 (1911).

Clearly, the lawyer's traditional obligation to represent indigents upon court order has not included any common-law right to compensation. And the statutory compensation which exists in some states usually contains limitations which in most cases would prevent a lawyer from receiving what his time is worth when working for private clients—limitations which would clearly be invalid if constitutional standards of just compensation were applicable. See Brownell, *Legal Aid in the United States*, Appendix C (1951) (listing and summarizing state statutes providing for compensation of appointed counsel). These statutory fees, which fre-

quently cover capital cases only, range from the Kansas maximum of $10 a day, Kans. Gen. Stat. 62-1304 (Supp. 1961), to the $1,500 maximum per case in New York (for capital cases only). Section 308, New York Code of Criminal Procedure (McKinney's, Supp. 1964). In Oregon, appointed counsel in a felony case is limited to a maximum of $75 per day of trial, and may not recover for more than three days of trial. Ore. Rev. Stat. 135.330. In short, the ancient, traditional obligation of lawyers to represent indigents on court order has, for most of the many years of its existence, been an obligation to serve without compensation, and has been modified by statute only to allow fees which generally do not give the lawyer what his time is worth and which often are payable only in limited types of cases.[3]

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3. There are only three states in which the courts have held that appointed counsel have a non-statutory right to just compensation. In Indiana, this result has been reached on the basis of a provision of the State constitution that "no man's particular *services* shall be demanded without just compensation." Indiana Constitution, art. 1, § 21. (Emphasis supplied.) *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940); *Webb v. Baird*, 6 Ind. 13 (1854). (We demonstrate below that the just compensation clause of the Fifth Amendment does not apply to personal services.)

In Wisconsin, the initial holding that appointed counsel was entitled to just compensation as a matter of constitutional right, *County of Dane v. Smith*, 13 Wis. 585 (1861), was impliedly overruled by *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N.W. 549 (1902), where it was held that appointed counsel was limited to the statutory fee, although it was obviously inadequate as a matter of just compensation, on the ground that lawyers as officers of the court have the implied obligation to represent indigents.

The course of events in Wisconsin was a repetition of what had happened in Iowa. An old Iowa case held that appointed counsel were entitled to just compensation on constitutional grounds. *Hall v. Washington Co.*, 2 G.Greene (Iowa) 473 (1850). Then a statute was passed in 1860, allowing compensation to appointed counsel but limiting it to $25. In *Samuels v. The County of Dubuque*, 13 Iowa 536 (1862), the court rejected an attack on this fee limitation as in violation of the just compensation clause of the state constitution, holding that representation of indigents is a duty of attorneys as "officers of the law."

A Fifth Amendment "taking" does not occur when the state simply requires an individual to fulfill a commitment he has made. *Kunhardt & Co. v. United States*, 266 U.S. 637. An applicant for admission to the bar may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court, obligated to represent indigents for little or no compensation upon court order. Thus the lawyer has consented to and assumed this obligation, and when he is called upon to fulfill it he cannot contend that there is a taking.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 696

EDWARD J. DILLON, IN THE MATTER OF THE PETITION OF MANLEY B. STRAYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28–43) is reported at 346 F. 2d 633. The opinion of the district court (Pet. App. 13–27) is reported at 230 F. Supp. 487.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1965. The order of the court of appeals denying a timely petition for rehearing was entered on July 27, 1965. The petition for a writ of certiorari was filed on October 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth Amendment entitles an attorney who has been directed by a federal court to represent an indigent to compensation for his services.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part as follows:

> * * * nor shall private property be taken for public use, without just compensation.

STATEMENT

In a proceeding under 28 U.S.C. 2255, Edward J. Dillon sought to set aside a conviction for armed bank robbery, on the ground that his plea of guilty had been induced by a false promise of leniency. The district court denied Dillon's request for the assignment of counsel and, after a hearing, declined to set aside the sentence. See *Dillon* v. *United States,* 230 F. Supp. 487, 489 (D. Ore.). The court of appeals reversed the district court's denial of relief on the ground that counsel should have been appointed. *Dillon* v. *United States,* 307 F. 2d 445.

Upon remand, the district court appointed petitioner to represent Dillon. At the time of the appointment, the district judge stated (230 F. Supp. at 496):

> * * * I think that in executing the command of the Court of Appeals I am conscripting your services for the benefit of another person to whom, I suggest, the government owes the duty to supply, and taking your property without just compensation.

> You, Mr. Strayer, and the members of your firm, have always been willing to represent indigent litigants without compensation, but in spite of your generosity, this court feels that you and other members of the bar should not be required to devote your time and lawyer tools, particularly in unusual cases of this kind, without some compensation therefor. * * *

Accordingly, the court invited petitioner to make application for compensation upon completion of his services.

At the hearing on remand, the district court held that Dillon's plea of guilty had not been coerced or induced by a false promise. However, the sentence was vacated on the ground that there had been a violation of Rule 32(a) of the Federal Rules of Criminal Procedure, and Dillon was held for re-sentencing. *Dillon* v. *United States,* 218 F. Supp. 948 (D. Ore.).

Petitioner then applied for compensation, requesting a fee of $5,000, plus expenses of $24.50.

The district court held (1) that it had jurisdiction under the Tucker Act to award compensation either on the basis of an implied contract or the Fifth Amendment,[1] and (2) that its order requiring petitioner to represent Dillon was a taking of his property for a public use within the meaning of the Fifth Amendment. The court ordered payment of compensation in the amount of $3804.54, representing $35 per hour for 108 hours, plus $24.54 for expenses.

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[1] The Tucker Act gives district courts jurisdiction, concurrent with the Court of Claims, of claims not exceeding $10,000 "founded either upon the Constitution * * * or upon any express or implied contract with the United States * * *." 28 U.S.C. 1346 (a)(2).

The court of appeals reversed. The court pointed out that the obligation of an attorney, as an officer of the court, to represent indigents upon court order is an established tradition of the bar and that attorneys who fulfill this obligation have generally been compensated, if at all, only by statutory fees which would be inadequate under principles of just compensation. The court stated that an applicant for admission to the bar should be aware of this traditional professional obligation, and that, accordingly, he may be deemed to assume the obligation when he joins the bar. Thus, the court held, there is no "taking" in the Fifth Amendment sense, but merely the fulfillment of an assumed obligation.

ARGUMENT

Petitioner seeks review of a decision of the Court of Appeals for the Ninth Circuit which denied his contention that the ancient practice[2] of courts in calling upon members of the bar to represent indigent parties without compensation violates the Fifth Amendment's ban on the taking of property for public use without just compensation. Petitioner's contention is unmeritorious and has no support in any circuit.

1. Petitioner concedes that the representation of indigents upon court order is an established tradition of the legal profession, and, as pointed out by the

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[2] See, *e.g.*, ——— v. *Scroggs*, 1 Freeman 390, 89 Eng. Rep. 289 (K.B. 1674); *Anonymous* (Case 975), 12 Mod. 583, 88 Eng. Rep. 1535 (K.B. 1702). This Court has said, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell* v. *Alabama*, 287 U.S. 45, 73.

court of appeals, appointed counsel have generally been compensated, if at all, by flat statutory fees which would be clearly inadequate under constitutional standards of just compensation.[3] Petitioner's contention is that the basis of this professional tradition has been undermined by *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, and *Konigsberg* v. *State Bar of California,* 353 U.S. 252. In those cases the Court held that a "State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment" and that "the practice of law is not a matter of the State's grace." 353 U.S. at 238–239 n. 5. But the proposition that a State may not impose arbitrary and irrational restrictions on admission to the bar certainly does not lead to a conclusion that a professional duty recognized throughout centuries of Anglo-American history may not be imposed on the members of the bar. An obvious *non sequitur* is entailed in petitioner's contention that, since admission to the bar is in some senses a right rather than a

[3] As pointed out in the Appendix to the opinion of the court of appeals (Pet. App. 40–42), the vast majority of courts have refused to award non-statutory fees to appointed counsel, and statutory fees have generally been at a flat rate, without regard to the earning power of the particular attorney involved. Under constitutional principles of just compensation, a court would be bound to consider the alternative uses of the particular attorney's time and to award higher compensation to the attorney who could have charged his private clients a higher fee for the time which the court requires him to spend representing an indigent. Compare Orgel, *Valuation under Eminent Domain,* §§ 28–30 (2d ed., 1953).

privilege, no burdens may be placed upon the exercise of that right. See *Lathrop* v. *Donohue*, 367 U.S. 820, where the Court upheld a requirement that lawyers join and pay dues to an integrated State bar. *Schware* and *Konigsberg* did not hold that the right to practice law is the right to enjoy all the privileges of the legal profession without any of the obligations that have traditionally accompanied those privileges. They removed unconstitutional obstacles to admission to the legal profession, but worked no change in the nature of the duties of the members of the profession.[4]

Petitioner points out that the recent expansion of the right of indigents to counsel may have increased the onerousness of the lawyer's obligation to represent indigents. However, petitioner does not contend that the burden of representing indigents has fallen disproportionately on his shoulders or that his selection from among his colleagues at the bar was invidiously arbitrary, unfair or unreasonable. Moreover, as the court below recognized (Pet. App. 35), resolution of the problems of providing and compensating counsel for the indigent calls for complex legislative judgments involving a variety of factors which would not be relevant under constitutional principles of "just compensation." It may, for example, be appropriate to consider the extent to which

[4] Petitioner urges that the tradition of representing indigents has been established largely in connection with criminal prosecutions (Pet. 9). However, collateral proceedings such as those under 28 U.S.C. 2255, while technically civil in nature, exist for the purpose of vindicating the procedural rights of criminal defendants, and thus are fairly included within the tradition of representing indigent criminal defendants.

the burden of representing indigents may fairly be allocated to the bar in light of the benefits accruing to lawyers from statutes prohibiting the unauthorized practice of law. Such decisions seem implicit in many State statutes providing for compensation of appointed counsel [5] as well as in the Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. 3006A.[6]

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[5] For a summary as of May 1, 1964, of State statutes regarding appointment of counsel for indigents, see Silverstein, *Defense of the Poor in Criminal Cases in American State Courts: A Preliminary Summary* (American Bar Foundation, 1964) 57–78. Many of the statutes providing compensation establish dollar limitations which vary, if at all, only according to the number of days of trial or the type of case (felony, misdemeanor; capital, non-capital). Four States have no provision for compensation of appointed counsel. Silverstein, "The Continuing Impact of *Gideon* v. *Wainwright* on the States," 51 A.B.A.J. 1023, 1024–1025 (November, 1965).

[6] The Criminal Justice Act requires compensation of appointed counsel in criminal prosecutions in the federal courts. The rate of compensation is not to exceed $15 an hour for time in court or before a commissioner, and $10 an hour for time outside court, with a total limit of $500 for a felony case and $300 for a misdemeanor case. The total limit may be exceeded in extraordinary circumstances with the approval of the chief judge of the circuit, upon a certification from the district court.

In the Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (the Allen Committee Report), which led to the Criminal Justice Act of 1964, a limit of $15 an hour was recommended, with no maximum per case. *Id.*, at pp. 41–43, 149–150. The Committee recognized that "the $15 hourly rate is conservative and considerably below that which is charged by retained counsel for similar services. No member of the Committee believes the figure is genuinely compensatory." *Id.*, at p. 55.

See also the remarks of Representative Poff, 110 Cong. Rec. 457 (Jan. 15, 1964) regarding the bill which became the Criminal Justice Act: "it is my strong conviction * * * that the

In view of the rapidly evolving law on the right to counsel, the efforts of State and federal governments and the bar to develop satisfactory mechanisms for supplying counsel,[7] and the complex legislative judgments involved, it seems singularly undesirable for the court to freeze the whole situation in relatively inflexible constitutional terms.[8]

2. Quite independently, the decision below is correct because a lawyer's personal services are not "property" within the meaning of the just compensation clause. That clause was intended as a limitation on the power of eminent domain,[9] and it would not appear that it is under the eminent domain power that personal services have customarily been requisitioned by the State. Moreover, in those situations where the State has the power to take a citizen's personal services—*e.g.*, for military service, for jury duty, as a witness—whatever compensation is paid rarely conforms to Fifth Amendment principles of just compensation:

> * * * the compensation is awarded upon a different principle from that employed when property is taken by eminent domain, as the

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practicing attorney owes a responsibility to his community to perform some services gratis. We have heretofore asked him to assume the entire burden in that regard. This legislation is intended to make it possible to lighten his burden."

[7] See Silverstein, "The Continuing Impact of *Gideon* v. *Wainwright* on the States," 51 A.B.A.J. 1023 (November, 1965).

[8] A decision sustaining petitioner's claim under the Fifth Amendment would, of course, be applicable to the States under the Fourteenth Amendment. See *Chicago, Burlington & Q. R.R.* v. *Chicago*, 166 U.S. 226, 241.

[9] See *United States* v. *Jones*, 109 U.S. 513, 518; Nichols, *Eminent Domain*, § 14 (3d ed., 1964).

> method sanctioned by ancient practice is to pay all persons alike, regardless of what their time or services may be worth. A statute applying the same method to eminent domain and fixing a uniform price for land taken for the public use, regardless of its actual value, would be clearly unconstitutional.

Nichols, *Eminent Domain* § 1.4[3] (3d ed., 1964). See, also, *Neely* v. *The State,* 63 Tenn. (4 Baxt.) 174 (1874) (just compensation clause of State constitution does not require compensation of jurors). Similarly, an expert witness is not constitutionally entitled to more than the fee for an ordinary witness simply because his time and services are worth more. *Bradley* v. *Davidson,* 47 App. D.C. 266, 284–285 (1918); *Ex parte Dement,* 53 Ala. 389 (1875); *Flinn* v. *Prairie County,* 60 Ark. 204, 29 S.W. 459 (1895); *Larimer County Commissioners* v. *Lee,* 3 Colo. App. 177, 32 Pac. 841 (1893). And an ordinary witness may constitutionally be required to serve without either compensation or reimbursement of travel expenses. *Daly* v. *Multnomah County,* 14 Ore. 20, 12 Pac. 11 (1886); *Henley* v. *State,* 98 Tenn. 665, 41 S.W. 352 (1897). In short, a lawyer ordered to represent an indigent is in the same position as a citizen ordered to jury duty, to appear as a witness, or to render military service—in each case, the person whose services are taken must rely on the legislature to provide him with compensation, since there is no taking of property in the constitutional sense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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